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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CURTIS HARRIS,

12 Petitioner,

13 v.

14 SCOTT KERNAN, Secretary,

15 Respondent.  
16

Case No.: 3:15-cv-001794-GPC-PCL

**ORDER ADOPTING REPORT AND  
RECOMMENDATION**

**[Dkt. No. 20]**

17 On August 13, 2015, Petitioner Curtis Harris (“Petitioner”), a state prisoner  
18 proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus  
19 (“Petition”) in federal court pursuant to 28 U.S.C. § 2254. Dkt. No. 1. Petitioner  
20 challenges his state court convictions in San Diego Superior Court Case No. SCD226968  
21 for assault by means likely to cause great bodily injury, Cal. Penal Code § 245(a)(1), and  
22 battery with serious bodily injury, Cal. Penal Code § 243(d). *Id.* at 2.

23 On August 15, 2016, pursuant to 28 U.S.C. § 636(b)(1), United States Magistrate  
24 Judge Peter Lewis issued a Report and Recommendation (“Report”) that this Court deny  
25 the Petition. Dkt. No. 20. Pursuant to that Report, Petitioner had until September 15,  
26 2016 to file objections. *Id.* On September 8, 2016, Petitioner moved for an extension of  
27 time to file objections. Dkt. No. 22. This Court subsequently granted the motion and  
28 gave Petitioner until November 14, 2016 to file an opposition. Dkt. No. 23. On October

1 25, 2016, Petitioner filed yet another motion for an extension of time asking for an  
2 additional ten days “up to and including until Oct. 24, 2016” in which to file his  
3 opposition. Dkt. No. 25. On October 27, 2016, the Court denied Petitioner’s request as  
4 moot because the Court’s previous order had already extended Petitioner’s deadline to  
5 November 24, 2016. Dkt. No. 27. Notwithstanding the Court’s approval of an extension,  
6 Petitioner never filed objections to the Report.

7 After careful consideration of the pleadings and relevant lodgments submitted by  
8 the parties, the Court finds Magistrate Judge Lewis’ Report to be thorough, complete, and  
9 an accurate analysis of the legal issues presented in the Petition. For the reasons  
10 explained below, this Court: (1) **ADOPTS** the Magistrate Judge’s Report in its entirety  
11 denying the petitioner for writ of habeas corpus, and (2) **DENIES** a certificate of  
12 appealability.

## 13 **BACKGROUND**

### 14 **A. Procedural Background**

15 On March 22, 2011, the San Diego County District Attorney’s Office filed an  
16 amended felony complaint charging Petitioner with assault by means likely to produce  
17 great bodily injury in violation of California Penal Code (“Penal Code”) section 245(a)(1)  
18 (Count 1), attempt to dissuade a witness from prosecuting a crime in violation of Penal  
19 Code section 136.1(b)(2) (Count 2), and battery with serious bodily injury in violation of  
20 Penal Code section 243(d) (Count 4).<sup>1</sup> Dkt. No. 14-1 at 42-43.

21 Following a jury trial, Petitioner was found guilty of Counts 1 and 4 and not guilty  
22 of Count 2. *Id.* at 132-34. The jury further found that the Petitioner had, in fact,  
23 personally inflicted great bodily injury upon the victim, Jodi Tannehill, within the  
24 meaning of Penal Code section 12022.7(a).<sup>2</sup> *Id.* at 132. A new trial motion, filed August  
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26 <sup>1</sup> Count 3 charged a co-defendant. Dkt. No. 14-1 at 24.

27 <sup>2</sup> “Any person who personally inflicts great bodily injury on any person other than an accomplice in the  
28 commission of a felony or attempted felony shall be punished by an additional and consecutive term of  
imprisonment in the state prison for three years.”

1 3, 2011 by trial counsel Gretchen Von Helms, argued that Petitioner was deprived of his  
2 right to a fair trial as the result of multiple *Brady* errors (*Brady v. Maryland*, 373 U.S. 83  
3 (1963)) and the totality of the circumstances. *Id.* at 166. Another new trial motion, filed  
4 July 24, 2012 by new counsel, argued that Defendant was denied effective assistance of  
5 trial counsel which was prejudicial to his case; that the trial court erred in barring third-  
6 party culpability evidence; and that there was insufficient evidence to support the trial  
7 verdict. Dkt. No. 14-2 at 2-3. Both motions were denied, Dkt. No. 14-9 at 26, and  
8 Petitioner was sentenced to fourteen years in state prison on September 27, 2012. Dkt.  
9 No. 14-1 at 80.

10 Petitioner appealed his conviction with the California Court of Appeal, raising  
11 Claim 5 and part of Claim 1 of the habeas corpus petition presently before the Court.  
12 Dkt. No. 14-12 at 2. In the appeal, Petitioner argued that (1) “he received ineffective  
13 assistance when counsel failed to advocate for the court to instruct the jury that emotional  
14 trauma does not constitute ‘serious bodily injury’ in response to a jury note”; (2) that “the  
15 trial court violated its instructional duty under Penal Code section 1138 and his  
16 [Petitioner’s] due process rights by failing to provide a proper response to the jury’s  
17 question regarding whether psychological harm could constitute serious bodily injury”;  
18 and (3) that the restitution fine listed on the abstract of judgment was incorrectly listed as  
19 \$33,660 rather than \$3,360. *Id.* On January 16, 2014, the state appellate court rejected  
20 Petitioner’s first two contentions, but agreed with the third. *Id.*

21 On March 30, 2014, Petitioner filed a Writ of Habeas Corpus in the California  
22 Supreme Court. Dkt. 14-15 at 1. The petition was supported by a 43-page memorandum  
23 of points and authorities that laid out each of his grounds for relief. *Id.* at 8. Specifically,  
24 Petitioner alleged that (1) he was denied effective assistance of counsel at trial; (2) the  
25 prosecutor engaged in a pattern of misconduct resulting in the violation of Petitioner’s  
26 due process rights; (3) the trial court prejudicially erred by denying Petitioner’s motion to  
27 suppress; (4) the trial court prejudicially erred by denying his motion for substitution of  
28 counsel; (5) the trial court prejudicially erred by failing to properly respond to the jury’s

1 question regarding whether psychological harm could constitute serious bodily injury; (6)  
2 the trial court prejudicially erred by denying Petitioner's motion for new trial; and (7)  
3 Petitioner was denied effective assistance of counsel on appeal. *Id.* The California  
4 Supreme Court denied Petitioner's petition without comment on July 8, 2015. Dkt. No.  
5 14-16 at 1.

6 On August 13, 2015, Petitioner filed a Petition for Writ of Habeas Corpus under 28  
7 U.S.C. § 2254 in this Court. Dkt. No. 1 at 1. In it, he alleges the exact same grounds for  
8 relief that he had presented to the California Supreme Court. *Id.* at 17. What is more, a  
9 near identical copy of the 43-page memorandum of law and authorities attached to his  
10 California Supreme Court petition was attached to the instant Petition. *Id.* Respondent  
11 filed an opposition and lodged the state court records on December 21, 2015, arguing that  
12 habeas relief is unavailable for Petitioner because (1) the state court's rejection of  
13 Petitioner's claims of ineffective assistance of counsel was reasonable under 28 U.S.C.  
14 § 2254(d); (2) the state court's rejection of Petitioner's claims of prosecutorial  
15 misconduct was reasonable under 28 U.S.C. § 2254(d); (3) Petitioner's Fourth  
16 Amendment Claim is not cognizable on habeas corpus; (4) the state court's rejection of  
17 Petitioner's request for substitution of counsel was reasonable under 28 U.S.C. § 2254(d);  
18 (5) the state court's rejection of Petitioner's claim that the trial court improperly  
19 answered a jury question and that his counsel was ineffective in failing to challenge the  
20 trial court's answer was reasonable under 28 U.S.C. § 2254(d); (6) the state court's  
21 rejection of Petitioner's claim of insufficient evidence was reasonable under 28 U.S.C.  
22 § 2254(d); and (7) the state court's rejection of Petitioner's claim of ineffective assistance  
23 of appellate counsel was reasonable under 28 U.S.C. § 2254(d). Dkt. No. 13-1. Despite  
24 being granted a motion for extension of time to file a traverse, Petitioner never filed an  
25 opposition to Respondent's contentions before this Court. *See* Dkt. No. 19.

#### 26 **B. Standard of Review of Magistrate Judge's Report and Recommendation**

27 The district court's role in reviewing a Magistrate Judge's report and  
28 recommendation is set forth in 28 U.S.C. § 636(b)(1). The district court "may accept,

1 reject, or modify, in whole or in part, the findings or recommendations made by the  
2 magistrate judge.” 28 U.S.C. § 636(b)(1); *see also* Federal Rule of Civil Procedure  
3 72(b); *United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). In the absence of a  
4 timely objection from Petitioner, the Court need “only satisfy itself that there is no clear  
5 error on the face of the record.” Fed. R. Civ. P. 72(b) (advisory committee notes). When  
6 no objections are filed, a district court may assume the correctness of the magistrate  
7 judge’s findings of fact and decide the motion on the applicable law. *Campbell v. U.S.*  
8 *Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974). Here, Petitioner has not filed an objection  
9 to the Report. The Court will therefore assume the correctness of the magistrate judge’s  
10 findings of fact and decide the motion on the applicable law. *See id.*

### 11 **C. Factual Background**

12 This Court gives deference to state court findings of fact and presumes them to be  
13 correct; Petitioner may rebut the presumption of correctness, but only by clear and  
14 convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also Parle v. Fraley*, 506 U.S. 20,  
15 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from  
16 these facts, are entitled to statutory presumption of correctness). The following facts are  
17 taken from the unpublished California Court of Appeal opinion, affirming Petitioner’s  
18 conviction, Dkt. No. 14-12, Lodgment No. 5, *People v. Harris*, No. SCD226968 (Cal. Ct.  
19 App. Jan. 14, 2014), and are likewise summarized in the Magistrate Judge’s Report.

20 While at a party, Harris punched Jodi Tannehill in the face, causing her  
21 to fall to the floor. While Tannehill was unconscious on the floor, Harris  
22 poured beer on her, unzipped his pants and urinated on her. The emergency  
23 doctor who treated Tannehill after the attack testified that she suffered a  
24 hematoma (bleeding under the skin) on her forehead and an abrasion and  
25 bruising on the front of her head. He diagnosed her with a closed-head injury,  
26 an abrasion, and possible “GHB” poisoning. The doctor explained that a  
27 “closed-head injury” is commonly referred to as a “concussion.”

28 Tannehill testified that her injuries remained black, blue and painful for  
several weeks. As a result, she could not bite or chew and ate only soft foods.  
The bump on her head lasted for three to five months, and she had to have  
blood drained from her head twice after the attack. She suffered daily  
headaches for several months. Because of her headaches and the treatment,

1 she had to take time off from school. She also suffered panic attacks that  
2 affected her ability to work as a hairdresser.  
3 Dkt. No. 14-12 at 2-3.

### 4 DISCUSSION

5 A petition for federal habeas relief under 28 U.S.C. § 2254 can only be granted  
6 with respect to any claim that has been adjudicated on the merits in state court  
7 proceedings if the Court determines that the state court decided the petitioner's case in a  
8 manner that was "contrary to, or involved an unreasonable application of, clearly  
9 established Federal law, as determined by the Supreme Court of the United States," or  
10 "based on an unreasonable determination of the facts in light of the evidence presented in  
11 the state court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 403,  
12 412-13 (2000). "Federal habeas courts making the 'unreasonable application' inquiry  
13 should ask whether the state court's application of clearly established federal law was  
14 objectively unreasonable. . . . [rather than] transform the inquiry into a subjective one."  
15 *Williams*, 529 U.S. at 409-10. Even if Petitioner can satisfy § 2254(d), or demonstrate  
16 that it does not apply, Petitioner must still show that a federal constitutional violation  
17 occurred, and that any such constitutional error had a "substantial and injurious effect."  
18 *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007); *Arizona v. Fulminante*, 499 U.S. 279, 306  
(1991) (stating "most constitutional errors can be harmless." ).<sup>3</sup>

19 When the California Supreme Court summarily denies a petition for review  
20 without citation to authority, claims raised by a petitioner before the district court are  
21 analyzed according to the last reasoned state court decision on the issue. *Ylst v.*  
22 *Nunnemaker*, 501 U.S. 797, 803-06 (1991); *Medina v. Hornung*, 386 F.3d 872, 877 (9th  
23 Cir. 2004). According to that practice, district courts should presume that the state  
24 supreme court denial rested upon the same ground as that presented by the last reasoned  
25 decision. *Ylst*, 501 U.S. at 803; *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005)  
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28 <sup>3</sup> The Court observes that Petitioner has not challenged the applicability of 28 U.S.C. § 2254(d).

(looking through silent denial by state supreme court to appellate court decision, which similarly did not address the issue, to the trial court opinion, which did address the issue before the district court). When a federal habeas court is faced with reviewing a state court denial for which there is no reasoned decision, the deferential standard under § 2254(d) cannot be applied because there is “nothing to which we can defer.” *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002). “Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 98 (2011). “[W]hen the state court does not supply reasoning for its decision,’ we are instructed to engage in an ‘independent review of the record’ and ascertain whether the state court’s decision was ‘objectively unreasonable.’” *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013) (quoting *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000)); *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) (“Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively reasonable.”).<sup>4</sup>

**1. Reasonable denial of Petitioner’s Sixth Amendment ineffective assistance of counsel claim.**

As summarized by the Magistrate Judge’s Report, Petitioner argues that his trial counsel, Gretchen Von Helms, rendered ineffective assistance of counsel in violation of Petitioner’s Sixth Amendment rights. Dkt. No. 1 at 32. Specifically, Petitioner contends that trial counsel was ineffective by: (1) failing to adequately prepare for trial; (2) failing to call alibi witnesses; (3) failing to object to a *Brady v. Maryland* violation; (4) failing to retain a DNA expert and retest DNA evidence; and (5) admitting Petitioner’s guilt in

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<sup>4</sup> The Court notes that the conclusions reached below do not depend upon whether the Court analyzed the “last reasoned opinion” or whether it conducted an “independent review of the record” to determine whether the California Supreme Court’s denial of Petitioner’s claims were “objectively unreasonable,” because each of Petitioner’s claims fails under both rubrics.

1 closing argument.<sup>5</sup> *Id.* at 31-47. In its opposition, Respondent avers that the state court  
2 acted reasonably by denying Petitioner’s claims because his conclusory allegations were  
3 insufficient to satisfy the two-pronged test for demonstrating ineffective assistance of  
4 counsel.

5 To establish that counsel’s performance was ineffective, Petitioner must show that  
6 (1) his “counsel’s representation fell below an objective standard of reasonableness” and  
7 (2) that such failure prejudiced him in that there is a “reasonable probability that, but for  
8 counsel’s unprofessional errors, the result of the proceeding would have been different.”  
9 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). When considering a claim of  
10 ineffective assistance of counsel, a reviewing court must be highly deferential to  
11 counsel’s performance. *Id.* at 689. “Counsel’s competence, however, is presumed and  
12 the defendant must rebut this presumption by proving that his attorney’s representation  
13 was unreasonable under prevailing professional norms and that the challenged action was  
14 not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). This  
15 necessitates a case-by-case examination of the evidence. *See Williams v. Taylor*, 529  
16 U.S. at 391.

17 When reviewing state prisoner habeas claims based on ineffective assistance of  
18 counsel, federal courts must use the “doubly deferential standard of review that gives  
19 both the state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*, 134  
20 S. Ct. 10, 13 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 171-72 (2011)).  
21 Finally, when evaluating a petitioner’s claim of ineffective assistance of counsel, a court  
22 may address prejudice without first deciding if counsel’s performance was deficient  
23 because both deficient performance and prejudice must be established to warrant relief.  
24 *Villafuerte v. Stewart*, 111 F.3d 616, 630 (9th Cir. 1997).

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27 <sup>5</sup> All but the fifth IAC claim was brought before the trial court on the motion for new trial, i.e., “the last  
28 reasoned decision.” Dkt. No. 14-9 at 55-58. Thus, the Court conducts an “independent review” of the  
constitutional issue only as to Petitioner’s claim regarding counsel’s closing argument. *See Walker*, 709  
F.3d at 939.



1           Petitioner contends that counsel was ineffective under *Strickland* because she did  
2 not spend “a great deal of time and effort” in preparing his defense and sentencing. Dkt.  
3 No. 1 at 34. More specifically, Petitioner avers that counsel did not undertake sufficient  
4 research into his “background” and the “context of the facts and circumstances of the  
5 case.” *Id.* Such arguments, however, are not enough to establish that the state court  
6 unreasonably applied the *Strickland* standard. In rejecting Petitioner’s *Strickland* claim,  
7 the trial court concluded that counsel was “well prepared” in the case and that counsel  
8 exhibited “extensive knowledge of the facts.” Dkt. No. 14-19 at 55. Given these  
9 findings, it was not unreasonable to conclude that counsel’s performance did not fall  
10 below professional norms. Moreover and even if such a conclusion was unreasonable in  
11 light of *Strickland*, Petitioner’s motion still fails for lack of prejudice. Petitioner has  
12 made no argument explaining what facts or circumstances counsel would have uncovered  
13 had she devoted more time to Petitioner’s defense or sentencing, or how those facts  
14 would have made it reasonably probable that the verdict or sentencing would have been  
15 different. Accordingly, Petitioner has not demonstrated ineffective assistance of counsel  
16 with respect to counsel’s preparation.

17           Next, Petitioner contends that counsel was ineffective for refusing to call alibi  
18 witnesses. Dkt. No. 1 at 35-36. This argument is also insufficient to meet Petitioner’s  
19 burden under 28 U.S.C. § 2254(d). The trial court rejected Petitioner’s *Strickland* claim  
20 because it found that counsel’s failure to call the challenged witnesses was tactical. Dkt.  
21 No. 1 at 56-57. In fact, as Respondent points out, none of the three witnesses that  
22 Petitioner identified as alibi witnesses actually provided alibi testimony. Dkt. No. 13-1 at  
23 12. The altercation with the victim occurred sometime between 11:00 pm on March 13,  
24 2010 and 2:00 am on March 14, 2010. Dkt. No. 14-4 at 191-93. Yet Petitioner’s “alibi”  
25 witnesses only accounted for Petitioner’s whereabouts from 2:30 am onward on March  
26 14, 2010. *See* Dkt. No. 14-2 at 59, Joyce Jones Decl. (“We got to Chantel’s house  
27 sometime before 2:00 a.m. . . . A few minutes after we arrived, Curt arrived at Chantel’s  
28 house . . . .”); Dkt. No. 14-2 at 62, Michelle Gothard Interview (“ . . . at about 0230 am,

1 Michelle went to military housing after she received a call from Robert Whaley . . . .  
2 Michelle said she . . . picked up Robert Whaley, Daniel Cruz, Sadie Diaz, and Curtis  
3 Harris.”). Accordingly, the Court concludes that it was not unreasonable for the state  
4 court to find that the failure to call these witnesses was tactical and, therefore, not a  
5 violation of *Strickland*. See 28 U.S.C. § 2254.

6 Petitioner also contends that counsel was ineffective in failing to challenge a *Brady*  
7 violation. Specifically, Petitioner avers that counsel “failed to impeach” Detective  
8 Medina regarding the first photographic lineup, which did not include a picture of  
9 Petitioner. See Dkt. No. 1 at 67. Yet again, however, this argument is not enough to  
10 demonstrate that the state court unreasonably applied federal constitutional law. The trial  
11 court concluded that no prejudice resulted from failing to disclose that the first  
12 identification lineup did not include Petitioner because “more than one witness who was  
13 familiar with the defendant prior to the time of attack” testified as eyewitnesses. Dkt. No.  
14 14-9 at 57. Accordingly and in light of the fact that Defendant had been identified by  
15 other eyewitnesses, the Court concludes that the state court did not unreasonably  
16 conclude that no prejudice resulted from this alleged *Brady* violation. See 28 U.S.C.  
17 § 2254.

18 Petitioner goes on to argue that counsel was ineffective because she “never  
19 obtained an expert on DNA analysis and never requested to have the DNA re-analyzed by  
20 his own expert.” Dkt. No. 1 at 102. Petitioner asserts that DNA evidence was “a [k]ey  
21 part of the prosecution’s case and defense counsel had a duty to obtain expert witnesses  
22 to advise her as well as to have the DNA re-analyzed by her own expert.” *Id.* This  
23 argument is not enough to meet Petitioner’s 28 U.S.C. § 2254(d) burden. The trial court  
24 concluded that there was no evidence to support the assertion that counsel’s decision was  
25 anything but tactical and that any failure to call such witnesses did not fall below the  
26 performance of a “reasonable competent counsel.” Moreover and as pointed out by  
27 Respondent, counsel stated in her declaration to the trial court that she had specifically  
28 discussed with Petitioner “whether it would be advantageous to have a DNA expert

1 testify” given that his DNA was present at the scene of the party. Dkt. No. 14-2 at 54.  
2 That counsel had such a discussion with her client lends reason to the state court’s  
3 conclusion that any the failure to call a DNA expert was a strategic decision made in  
4 consultation with Petitioner. Accordingly, the Court concludes that it was not  
5 unreasonable for the state court to deny Petitioner’s *Strickland* claim on this count.

6 Lastly, Petitioner avers that counsel rendered ineffective assistance of counsel by  
7 conceding Petitioner’s guilt during closing argument. Dkt. No. 1 at 32. Specifically,  
8 Petitioner contends that “counsel’s closing argument or lack there of was reprehensible [sic]  
9 her deficient performance all but declared Mr. Harris guilty.” *Id.* This argument likewise  
10 fails. An independent review of the record does not raise any objective concern that the  
11 closing argument was constitutionally deficient. *See Walker*, 709 F.3d at 939. In her  
12 closing argument, counsel stated the following:

13 . . . Mr. Curtis Harris is not guilty of these fabrications, accusations against  
14 him. He is not guilty. I hold this up for you. This is one of your jury  
15 instructions. It says a defendant in a criminal case is presumed to be innocent.  
16 Jodi Tannehill, I feel bad for her . . . She doesn’t really remember anything.  
17 She certainly doesn’t say Mr. Harris hit me or punched me. [I]f you recall,  
18 she was shown lineup pictures with his picture in it, and she didn’t pick him  
19 out at that time . . . If it had been Curtis Harris, Brandy and Lashonna would  
have said there he is, right there, standing there with Sadie. And they were all  
asked to leave by the police. They don’t say that. They come up with this  
later. . . .

20 Dkt. No. 14-7 at 294-300. Given that these and other statements contradict Petitioner’s  
21 assertion that counsel conceded guilt in her closing, the Court cannot conclude that the  
22 state court’s rejection of Petitioner’s *Strickland* claim was objectively unreasonable. As  
23 such, Petitioner’s argument fails.<sup>6</sup>

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26 <sup>6</sup> To the extent that the Petition also argues that trial counsel violated his Sixth Amendment rights by  
27 coercing him not to testify, Dkt. No. 1 at 36, the Court likewise concludes that Petitioner has failed to  
28 state a *Strickland* claim as to that fact. As the Report emphasizes, “Petitioner failed to provide factual  
support that he was coerced into refraining from testifying on his own behalf. On the record, Petitioner  
never indicated that he wanted to testify or that he was prevented from doing so by counsel.” Dkt. No.  
20 at 8.

1 For the foregoing reasons, this Court **DENIES** Claim 1 concerning trial counsel's  
2 ineffective assistance of counsel. Petitioner has not demonstrated that trial counsel acted  
3 deficiently in violation of the Sixth Amendment, and even if counsel had, Petitioner has  
4 not shown any error to be prejudicial. The state court's adjudication of the claim was,  
5 therefore, neither contrary to, nor an unreasonable application of, clearly established  
6 federal law. *See* 28 U.S.C. § 2254(d).

7 **2. Reasonable denial of Petitioner's claims of prosecutorial misconduct.**

8 Petitioner alleges that the prosecution engaged "in a pattern of misconduct  
9 throughout trial, violating petitioner's federal constitutional right to due process,  
10 requiring reversal." Dkt. No. 1 at 47. Specifically, Petitioner argues that the prosecutor  
11 impermissibly told the jury that Petitioner assaulted the victim and urinated on her  
12 without any good faith basis for those factual assertions. *Id.* at 48. As such, Petitioner  
13 argues, the prosecutor elicited "inadmissible hearsay testimony" and "improperly  
14 attempted to shift the burden of proof to the defense during closing argument." *Id.* at 48-  
15 49. Respondent, in turn, argues that Petitioner has failed to demonstrate that the  
16 California Supreme Court, the only state court to review this claim, unreasonably applied  
17 controlling United State Supreme Court precedent in rejecting Petitioner's claim. Dkt.  
18 No. 13-1 at 15.

19 In the case of federal habeas review of prosecutorial misconduct, "The relevant  
20 question is whether the prosecutor[']s comments so infected the trial with unfairness as to  
21 make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S.  
22 168, 181 (1986) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). For purposes  
23 of granting federal habeas relief, any prosecutorial trial error must be more than merely  
24 undesirable or erroneous, it must rise to the level of a constitutional denial of due process,  
25 and be reviewed in the context of the entire trial. *Donnelly*, 416 U.S. at 643.  
26 Prosecutorial misconduct, therefore, violates due process only if the evidence presented,  
27 taken as a whole, gives a jury a false impression. *Downs v. Hoyt*, 232 F.3d 1031, 1038  
28 (9th Cir. 2000) (citations omitted).

1           Upon “independent review of the record” for objective reasonableness, *see Walker*,  
2 709 F.3d at 939, this Court concludes that Petitioner has failed to demonstrate any due  
3 process violation, nevertheless that the state court unreasonably applied the Supreme  
4 Court’s precedent on prosecutorial misconduct.

5           First, Petitioner’s argument that the prosecutor committed misconduct by eliciting  
6 hearsay testimony is without merit. Petitioner contends that the prosecution “put on  
7 numerous witnesses who claimed that they witnessed Mr. Harris assault and urinate on  
8 Ms. Tannehill.” Dkt. No. 1 at 47. These witnesses, according to Petitioner, “presented  
9 serious credibility problems . . . had motive to lie . . . and testified to facts not in  
10 evidence, hearsay and multiple hearsay and made statements that were induced by the  
11 prosecutor.” *Id.* What this line of argument fails to appreciate, however, is that  
12 statements made by witnesses who testify at trial are not hearsay. *See* Federal Rule of  
13 Evidence 801(c). What is more, and as the Report points out, because these adverse  
14 witnesses took the stand, Petitioner had an opportunity to cross-examine and impeach  
15 them. Petitioner, therefore, has failed to demonstrate any prosecutorial misconduct and  
16 failed to state a claim for habeas relief. Moreover and even if Petitioner had stated a  
17 cognizable claim, Petitioner’s argument would still fail because it does not demonstrate  
18 that it was unreasonable for the state court to find no due process violation.

19           Second, Petitioner’s contention that the prosecutor committed misconduct by  
20 improperly shifting the burden of proof to the defense during closing argument is also  
21 without merit. Dkt. No. 1 at 49. Petitioner argues that the following excerpt from the  
22 prosecutor’s closing argument impermissibly shifted the burden of proof to the defense.

23           Ms. Von Helms has done a great job in this case because there aren’t witnesses  
24 for Mr. Harris. There aren’t facts for Mr. Harris. It is clear as day. We have  
25 got DNA evidence proving that he was a contributor to the sweat-shirt. There  
is not fact, good facts for them to argue.

26 *Id.* at 53. Yet contrary to what Petitioner asserts, this language does not amount to a due  
27 process violation.  
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1 “It is common practice for one side to challenge the other to explain to the jury  
2 uncomfortable facts and inferences.” *U.S. v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991).  
3 “Comments intended to highlight the weaknesses of a defendant’s case do not shift the  
4 burden of proof to the defendant where the prosecutor does not argue that a failure to  
5 explain them adequately requires a guilty verdict and reiterates that the burden of proof is  
6 on the government.” *U.S. v. Vaanderling*, 50 F.3d 696, 701-02 (9th Cir. 1995).

7 The prosecutor, here, did not argue that Petitioner’s failure to call witnesses  
8 required a guilty verdict. Dkt. No. 14-7 at 290-93. And although the prosecutor’s  
9 closing argument did not explicitly emphasize that the government bore the burden of  
10 proof, Petitioner has not demonstrated how this comment “infected the trial with  
11 unfairness as to make the resulting conviction a denial of due process.” *Darden*, 477  
12 U.S. at 181.

13 Moreover and even if the argument was improper, the trial court’s instructions  
14 cured any defect. During jury instructions, the trial court reminded the jury that “the  
15 people have the burden of proving beyond a reasonable doubt that it was the defendant  
16 who committed the crime. If the people have not met this burden, you must find that the  
17 defendant is not guilty.” Dkt. No. 14-7 at 271. The trial court also emphasized that  
18 “nothing that the attorneys say is evidence. In their opening statements and closing  
19 arguments, the attorneys discuss the case, but their remarks are not evidence. Only the  
20 witness’ answers are evidence.” *Id.* at 263. The trial court also went on to underline the  
21 presumption of innocence. *Id.* at 274 (“A defendant in a criminal case is presumed to be  
22 innocent. This presumption requires that the People prove a defendant guilty beyond a  
23 reasonable doubt . . . . Unless the evidence proves the defendant guilty beyond a  
24 reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”) In  
25 addition, the trial court also highlighted that no inferences can be drawn from the  
26 defendant’s failure to testify. *Id.* at 273 (“A defendant has an absolute constitutional right  
27 not to testify. He or she may rely on the state of the evidence and argue that the People  
28

1 have failed to prove the charges beyond a reasonable doubt. Do not consider for any  
2 reason at all the fact that the defendant did not testify.”).

3 Given these instructions, coupled with the fact that the prosecution did not argue  
4 that the failure to present witnesses required a guilty verdict, the Court finds that it was  
5 objectively reasonable for the state court to find no prosecutorial misconduct in violation  
6 of due process. *See U.S. v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991) (finding that jury  
7 instruction cured improper prosecutorial argument regarding defendant’s decision not to  
8 testify where district court instructed jury that counsel’s argument were not evidence, that  
9 defendant need not prove his innocence, and that no inference could be drawn from  
10 failure to testify). The Court moreover concludes that in light of the trial courts’ jury  
11 instructions and the nature of the prosecutor’s allegedly improper closing argument, any  
12 misconduct did not result in a miscarriage of justice requiring reversal of judgment.  
13 *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Darden*, 477 U.S. at 182.

14 For the foregoing reasons, this Court **DENIES** Claim 2 concerning prosecutorial  
15 misconduct in violation of due process. Petitioner has not demonstrated that any  
16 prosecutorial misconduct constituted a due process violation, and even if Petitioner had,  
17 he has not demonstrated why such an error was prejudicial. The state court’s  
18 adjudication of the claim was, therefore, neither contrary to, nor an unreasonable  
19 application of, clearly established federal law. *See* 28 U.S.C. § 2254(d).

20 **3. Cognizability of Petitioner’s claim that denial of motion to suppress**  
21 **violated the Fourth Amendment.**

22 Petitioner argues that the trial court erred by denying Petitioner’s motion to  
23 suppress identification testimony, the victim’s sweatshirt, and DNA testimony offered  
24 against him at trial. Dkt. No. 1 at 55-56. Respondent replies by contending that  
25 Petitioner’s claim is not cognizable on federal habeas corpus. This Court agrees.

26 The Supreme Court has held that defendants have the right to a full and fair  
27 litigation of any Fourth Amendment claim. “[W]here the State has provided an  
28 opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may

1 not be granted federal habeas corpus relief on the ground that evidence obtained in an  
2 unconstitutional search or seizure was introduced at his trial.” *Stone v. Powell*, 428 U.S.  
3 465, 469 (1976). Petitioner, therefore, has a cognizable Fourth Amendment claim only  
4 insofar as he was denied the opportunity to be heard on his motion to suppress. *See*  
5 *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996) (“The relevant inquiry is  
6 whether petitioner had the opportunity to litigate his claim, not whether he did in fact do  
7 so or even whether the claim was correctly decided.”).

8 No such denial occurred here. A motion to suppress brought pursuant to Penal  
9 Code § 1538.5 provides a defendant with the full and fair opportunity to litigate  
10 contemplated by *Powell*. *See Gordon v. Duran*, 895 F.2d 610, 613-14 (9th Cir. 1990).  
11 Accordingly and because Petitioner has failed to state a claim cognizable under federal  
12 habeas law, the Court concludes that Petitioner has failed to state a habeas claim. Thus,  
13 and for the foregoing reasons, the Court **DENIES** Claim 3 concerning violation of  
14 Petitioner’s Fourth Amendment rights.

15 **4. Cognizability of Petitioner’s claim that trial court’s denial of Petitioner’s**  
16 **motion for substitution of counsel violated the Sixth Amendment.**

17 Petitioner next argues that the trial court violated his Sixth Amendment right to the  
18 counsel of his choosing. Dkt. No. 1 at 58. Respondent, in turn, dismisses this claim  
19 because the trial court never adjudicated any question concerning the substitution of  
20 counsel. Dkt. No. 13-1 at 17. The Court agrees that Petitioner has not stated a valid  
21 habeas claim in this regard.

22 Petitioner, like all criminal defendants, has a right to the assistance of counsel for  
23 his defense. U.S. Const. amend. VI. Defendants who can afford to retain counsel have a  
24 qualified right to obtain counsel of their choice. *Caplin & Drysdale, Chartered v. U.S.*,  
25 491 U.S. 617, 624 (1989). Defendants who cannot afford to retain counsel have a  
26 constitutional right to have counsel appointed. *Faretta v. California*, 422 U.S. 806, 807  
27 (1975). A constitutionally infirm denial of substitution of counsel occurs where the  
28 conflict between the defendant and counsel became so severe that it resulted in a “total



1 lack of communication or other significant impediment that resulted [ ] in an attorney-  
2 client relationship that fell short of that required by the Sixth Amendment.” *Schell v.*  
3 *Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000). An attorney-client relationship, however,  
4 need not be meaningful to meet this standard. *Entsminger v. Iowa*, 386 U.S. 748, 751  
5 (1967). Rather, the relationship merely must be enough to allow counsel to act as an  
6 advocate. *Id.*

7 On April 1, 2011, Petitioner informed the trial court that he wanted to substitute his  
8 counsel. Dkt. No. 14-7 at 1290. On April 6, 2011, Petitioner abandoned his request. *Id.*  
9 at 1304 (“We conducted that hearing yesterday based on your request to have different  
10 counsel. Based on the events that have occurred since that time, am I correct that you are  
11 no longer asking the Court to change your attorney? . . . Yes . . . All right. . . . And the  
12 Court based upon the defendant’s withdrawal of his request of different counsel, we will  
13 proceed.”). The trial court, therefore, could not have erred in denying Petitioner’s motion  
14 for substitution of counsel because Petitioner withdrew that motion before any  
15 adjudication took place. Accordingly, Petitioner has not stated a valid claim for habeas  
16 relief. Thus, and for the foregoing reasons, the Court **DENIES** Claim 4 concerning  
17 violation of Petitioner’s Fourth Amendment rights.

18 **5. Reasonable denial of Petitioner’s claim that trial judge erred in responding**  
19 **to jury question.**

20 Petitioner argues that the trial court violated his constitutional rights by  
21 inadequately responding to a jury note given to the court during jury deliberation. Dkt.  
22 No. 1 at 60-61. Respondent counters by arguing that Petitioner has failed to demonstrate  
23 how the trial court’s response amounted to a constitutional violation. Dkt. No. 13-1 at  
24 19.

25 “When a jury makes explicit its difficulties a trial judge should clear them away  
26 with concrete accuracy.” *Bollenbach v. U.S.*, 326 U.S. 607, 612 (1946). When a judge’s  
27 response to a specific jury request is in error, the court violates the defendant’s due  
28 process rights. *Beardslee v. Woodford*, 358 F.3d 560, 575 (9th Cir. 2004). Yet where a

1 court gives a correct instruction, and the judge directs the jury to the “precise paragraph  
2 that answered the question clearly” there is no constitutional defect because the jury is  
3 presumed to follow instructions. *Id.* (citing *Weeks v. Angelone*, 528 U.S. 225, 234  
4 (2000)).

5 During deliberations, the jury passed the following note to the court: “clearer  
6 definition of ‘battery causing serious bodily injury.’ Does that include emotional  
7 suffering, such as inability to perform job duties due to the emotional trauma caused by  
8 an injury?” Dkt. No. 14-12 at 3. The trial court responded to this inquiry by stating  
9 “[t]he definition of ‘serious bodily injury’ is contained in Instruction [CALCRIM No.]  
10 925, the final paragraph.” *Id.* The final paragraph of CALCRIM No. 925, as provided to  
11 the jury, read as follows: “A *serious bodily injury* means a serious impairment of physical  
12 condition. Such an injury may include, but is not limited to: . . . loss of consciousness/  
13 concussion/ bone fracture/ protracted loss or impairment of function of any bodily  
14 member or organ.” *Id.*

15 Petitioner does not argue that this response or jury instruction was erroneous.  
16 Petitioner only argues that the judge should have corrected the jury’s potentially  
17 erroneous understanding of the relevant instructions. Dkt. No. 1 at 60. A trial judge,  
18 however, enjoys wide discretion in responding to a question for the jury and need not  
19 exercise its duty in any “precise manner.” *Arizona v. Johnson*, 351 F.3d 988, 994 (9th  
20 Cir. 2003). Accordingly, and absent any argument that the trial judge’s instruction was  
21 erroneous, or an abuse of discretion, or that it otherwise infected the legal proceedings,  
22 Petitioner has failed to demonstrate any constitutional violation. As such, Petitioner’s  
23 claim fails. Furthermore and because Petitioner has not demonstrated any error in the  
24 trial court’s jury instruction, Petitioner has failed to demonstrate that trial counsel  
25 rendered ineffective assistance of counsel by not objecting to the judge’s response.

26 For the foregoing reasons, this Court **DENIES** Claim 5 concerning the trial court’s  
27 response to the jury instruction. Petitioner has not demonstrated that any trial court error  
28 constituted a due process violation, and even if Petitioner had, he has not demonstrated

1 why such an error was prejudicial. Moreover and because the Court does not find any  
2 due process violation, the Court similarly denies Petitioner's claim that trial counsel  
3 violated the Sixth Amendment by failing to object to the trial court's response to the jury.  
4 The state court's adjudication of the claim was, therefore, neither contrary to, nor an  
5 unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)

6 **6. Reasonable denial of Petitioner's claim of insufficient evidence in violation**  
7 **of due process.**

8 Petitioner next argues that the trial court erred in refusing to grant a new trial. Dkt.  
9 No. 1 at 63. Specifically, he alleges that the evidence adduced at trial did not provide  
10 substantial evidence of the crimes committed. *Id.* at 65. Respondent, in turn, argues that  
11 Petitioner has pointed to no record of or absence of evidence that challenges the trial  
12 court's denial or that renders the state court's denial of his claim objectively  
13 unreasonable. Dkt. No. 13-1 at 19.

14 The due process clause of the Fourteenth Amendment "protects the accused against  
15 conviction except upon proof beyond a reasonable doubt of every fact necessary to  
16 constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).  
17 Thus, "a state prisoner who alleges that the evidence in support of his state conviction  
18 cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt  
19 beyond a reasonable doubt has stated a federal constitutional claim." *Jackson v. Virginia*,  
20 443 U.S. 307, 321 (1979). The *Jackson* standard is applied "with explicit reference to the  
21 substantive elements of the criminal offense as defined by state law." *Davis v. Woodford*,  
22 384 F.3d 628, 639 (9th Cir. 2004). Moreover, "an additional layer of deference is added  
23 to this standard by 28 U.S.C. § 2254(d), which obliges [the defendant] to demonstrate  
24 that the state court's adjudication entailed an unreasonable application of the quoted  
25 *Jackson* standard." *See Briceno v. Scribner*, 555 F.3d 1069, 1078 (9th Cir. 2009).

26 Petitioner has failed to offer any argument regarding how the state court's denial of  
27 his request for new trial was contrary to, or an unreasonable application of, the *Jackson*  
28 standard. Petitioner avers, in conclusory fashion, that the judge "merely rubber stamped

1 the decision” and that the evidence was “flimsy, illogical and deficient,” Dkt. No. 1 at 65,  
2 but offers no argument regarding how the trial court misapplied *Jackson* nevertheless  
3 how the evidence at trial could not have led a rational trier of fact to find guilt beyond a  
4 reasonable doubt. What is more, upon an independent review of the evidence in the  
5 record, the Report has concluded that sufficient testimony supports the jury’s conclusion.  
6 *See* Dkt. No. 20 at 20.

7 For the foregoing reasons, this Court **DENIES** Claim 6 concerning the sufficiency  
8 of the evidence. Petitioner has not demonstrated any due process violation or offered any  
9 argument as to why the state court denial of his claim was objectively unreasonable. The  
10 state court’s adjudication of the claim was, therefore, neither contrary to, nor an  
11 unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)

12 **7. Reasonable denial of Petitioner’s claim of ineffective assistance of counsel**  
13 **on direct appeal.**

14 Lastly, Petitioner contends that his counsel on appeal violated his Sixth  
15 Amendment right to effective assistance of counsel by failing to bring the claims he has  
16 raised in this Petition on appeal. Dkt. No. 1 at 67. Specifically, Petitioner argues that  
17 “Had appointed appellate counsel raised these issues on appeal, the appellate court would  
18 have had to overturn the current conviction.” *Id.* at 70. Respondent, in turn, avers that  
19 this argument is without merit because Petitioner has failed to demonstrate that appellate  
20 counsel’s performance was deficient or prejudicial. Dkt. No. 13-1 at 20. The Court  
21 agrees.

22 A petitioner claiming ineffective assistance of appellate counsel must satisfy the  
23 *Strickland v. Washington* two-pronged test. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).  
24 Thus, to succeed on this claim, a petitioner must demonstrate both that appellate counsel  
25 unreasonably failed to discover and raise nonfrivolous issues and that it was reasonably  
26 probable that, had counsel raised such issues, he would have prevailed on appeal. *Id.*

27 Appellate counsel raised three issues on appeal, namely: (1) that trial counsel  
28 rendered ineffective assistance by failing to object to the court’s response to the jury’s

1 question regarding the definition of serious bodily injury; (2) that the trial court violated  
2 Petitioner's due process rights by not providing a proper response to the jury question;  
3 and (3) that the abstract of judgment should be modified by reducing the fine from  
4 \$33,660 to \$3,360. Dkt. No. 14-12.

5 Petitioner faults appellate counsel for only raising these three claims and for not  
6 arguing the other claims brought in this Petition. The constitution, however, does not  
7 require appellate counsel to raise every colorable or non-frivolous claim. *Jones v.*  
8 *Barnes*, 463 U.S. 745, 751-54 (1983). Thus, Petitioner fails to demonstrate that appellate  
9 counsel provided deficient performance merely by pointing out that counsel did not raise  
10 all of the claims presented here on appeal. What is more and in any event, Petitioner has  
11 also failed to explain why it was reasonably likely that he would have prevailed on appeal  
12 had counsel raised these issues. Accordingly, the Court concludes that the state court's  
13 denial of Petitioner's ineffective assistance of appellate counsel claim was not objectively  
14 unreasonable.

15 For the foregoing reasons, this Court **DENIES** Claim 7 concerning appellate  
16 counsel's ineffective assistance of counsel. Petitioner has not demonstrated that appellate  
17 counsel acted deficiently in violation of the Sixth Amendment, and even if counsel had,  
18 Petitioner has not shown any error to be prejudicial. The state court's adjudication of the  
19 claim was, therefore, neither contrary to, nor an unreasonable application of, clearly  
20 established federal law. *See* 28 U.S.C. § 2254(d).

### 21 **CERTIFICATE OF APPEALABILITY**

22 A petitioner complaining of detention arising from state court proceedings must  
23 obtain a certificate of appealability to file an appeal of the final order in a federal habeas  
24 proceeding. 28 U.S.C. § 2253(c)(1)(A). The district court may issue a certificate of  
25 appealability if the petitioner "has made a substantial showing of the denial of a  
26 constitutional right." *Id.* at (c)(2). To make a "substantial showing," the petitioner must  
27 "demonstrat[e] that reasonable jurists would find the district court's assessment of the  
28 constitutional claims debatable." *Beatty v. Stewart*, 303 F.3d 975, 984 (9th Cir. 2002)

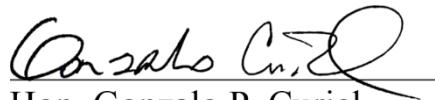
1 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Petitioner has not made a  
2 “substantial showing” as to any of the claims raised by his Petition, and thus the Court  
3 **DENIES** a certificate of appealability.

4 **CONCLUSION**

5 For all of the foregoing reasons, this Court: (1) **ADOPTS** the Magistrate Judge’s  
6 Report in its entirety denying the petition for writ of habeas corpus, and (2) **DENIES** a  
7 certificate of appealability.

8 **IT IS SO ORDERED.**

9 Dated: August 24, 2017

10   
11 Hon. Gonzalo P. Curiel  
12 United States District Judge  
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